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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1137

PAUL A. PACIERA, JR.,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PAUL A. PACIERA, JR.,
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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT

Petitioner, Paul A. Paciera, Jr., prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered into the above entitled case on November 12, 1975.

OPINIONS BELOW

The petitioner was convicted in the Twenty-Fourth Judicial District Court in and for the Parish of Jefferson, State of Louisiana, of the crime of receiving stolen things and sentenced to serve one (1) year in the Jefferson Parish Prison, which sentence was suspended and the petitioner placed on two (2) years active probation and fined $1,000.00 plus cost.

Thereafter, an appeal was taken to the Supreme Court of the State of Louisiana, which said court upheld the petitioner's conviction and sentence, with two (2) justices dissenting.

Petitioner thereafter sought relief by means of a Writ of Habeas Corpus in the United States District Court for the Eastern District of Louisiana, New Orleans Division, on the basis that his Fourth Amendment rights were violated as a result of an unlawful search and seizure. That court denied the writ of Habeas Corpus and an appeal was taken to the United States Court of Appeals for the Fifth Circuit. That court affirmed the decision of the District Court on November 12, 1975. The judgments and opinions of all lower courts are appended hereto as Appendix "1", "2", and "3", respectively.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT ARE INVOKED

The date of the judgment sought to be reviewed and the time of its entry is November 12, 1975.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

DOES AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT WHICH IS BASED UPON INFORMATION FROM AN UNNAMED INFORMANT MEET FOURTH AMENDMENT REQUIREMENTS WHEN:

I. The affiant has no personal knowledge of the reliability and credibility of the informant.

II. The affiant receives information from other third parties that an informant is reliable and credible, without the affidavit stating the grounds upon which the reliability and credibility of the third parties are based.

III. The affidavit fails to set forth the underlying circumstances and specific facts of how the informant(s) knows that which he (they) claims to have knowledge of.

IV. The affidavit fails to state the source from which the information was received.

V. The affidavit fails to allege personal observation or personal knowledge on the part of either the affiant, the informant(s) or the third party supplying the information to the affiant.

VI. The affidavit is based on double hearsay.

VII. The affidavit fails to explain how or from whom the informant(s) came by his (their) information.

VIII. The affidavit fails to show independent corroboration by the affiant or by any other source.

IX. The assertions of the informant(s) are conclusionary in nature and for all that appears, the affidavit came from an unidentified third party.

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioner, Paul A. Paciera, Jr., was charged in the Twenty-Fourth Judicial District Court in and for the Parish of Jefferson, State of Louisiana, with the crime of receiving stolen things in violation of state law.

Prior to trial, the petitioner filed a Motion to Suppress Evidence obtained on February 9, 1971, in the search of petitioner's home. The State District Court denied the Motion to Suppress and the evidence seized was subsequently admitted into evidence at trial over the objection of petitioner.

The Motion to Suppress was based on the contents of the affidavit itself, alleging that the facts and circumstances set forth therein were insufficient to support a finding of probable cause within the constitutional mandates contained in the Supreme Court's decisions of *Aguilar v. Texas*, 378 U.S. 108, 84

S.Ct. 1509, 12 L.Ed.2d 723, and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637.

REASONS FOR GRANTING THE WRIT

I.

IN PERMITTING A SEARCH WARRANT TO BE BASED UPON AN AFFIDAVIT CONTAINING CONCLUSIONARY ALLEGATIONS OF CRIMINAL ACTIVITY WITHOUT FACTUAL VERIFICATION AND WITHOUT A SHOWING OF PERSONAL OBSERVATION OR OF INDEPENDENT CORROBORATION, THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT RENDERED A DECISION WHICH IS IN CONFLICT WITH THE CONSTITUTIONAL MANDATES OF THE SUPREME COURT AND ONE WHICH ENDANGERS FOURTH AMENDMENT GUARANTEES.

Neither the United States District Court nor the Fifth Circuit Court of Appeals filed any substantial written reasons concerning the denial of the Writ of Habeas Corpus and/or the affirmance of the petitioner's conviction, both courts relying on the decision as set forth in *State v. Paciera*, 290 So.2d 682, being attached hereto as Appendix "1".

The petitioner submits to this court, that in so doing, these courts have made an unprecedented and far reaching pronouncement in the area of the Fourth Amendment rights in direct defiance of the constitutional mandates set forth by the Supreme Court decisions in Aguilar and Spinelli, as well as subse-

quent cases, by finding probable cause in an affidavit that fails to set forth that the unnamed informant is credible and reliable and the grounds upon which his credibility and reliability is based and by failing to require that the affidavit set forth the underlying circumstances of how this informant knew what he claimed to have knowledge of.

The petitioner submits that the affidavit in support of the search warrant (Appendix 4) was deficient in meeting constitutional requirements necessary to support a finding of probable cause in that the affiant failed to set forth sufficient facts pertaining to the credibility and reliability of the two (2) New Orleans policemen and/or of the informant and the grounds upon which their reliability and credibility was based and failed to set forth specific facts or underlying circumstances upon which the knowledge of the two (2) officers and/or informant was based. That the affidavit, as is, does not form a basis from which an independent magistrate could conclude that probable cause existed for the issuance of a search warrant, making any evidence seized thereunder inadmissible under the Fourth Amendment's protection against unreasonable and/or unlawful searches and seizures.

In determining whether or not the affidavit referred to herein sufficiently demonstrates the showing of probable cause necessary for the issuance of the search warrant, the court is required to look at the four (4) corners thereof and the language contained therein for a search warrant is required to rest exclusively on facts stated in the supporting affidavit. *State v. Anselmo*, 256 So.2d 98, 260 La. 306, Certiorari denied, 92 S.Ct. 2438, 407 U.S. 911, 32 L.Ed.2d 685.

In the cases of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, certain guidelines emerged that set forth the requirements necessary for an affidavit in support of a search warrant to meet constitutional sufficiency for its issuance.

The affidavit must set forth:

(a) That the informant is credible and reliable and the grounds upon which his credibility and reliability is based; and

(b) The underlying circumstances of how the informant knows what he claims to have knowledge of.

An affidavit that fails to meet these requirements, lacks probable cause and hence cannot be used as a basis for the issuance of the search warrant which can only issue on a showing of probable cause under the Fourth Amendment.

The affiant in this case, states that the information he received was from two (2) New Orleans policemen, who had received information from a confidential informant. The two (2) officers state that the informant was reliable and the basis therefore, but nowhere is it stated that the affiant (who is required by law to swear to his confidant's reliability and credibility) knew this informant to be reliable and credible and the grounds upon which that was based nor is there any allegations contained therein that he ever had any contact or ever spoke to this informant or used him in

the past. This surely did not meet the requirements of Spinelli and Aguilar to the reliability of that informant to this affiant. The information received was based on a double hearsay by means of the two (2) New Orleans policemen, but the affidavit also is void as to their reliability and credibility and as to the prior reliability and credibility of those two (2) officers as to the affiant. There is nothing to establish the reliability chain as between informant and affiant nor between the two (2) officers and affiant.

Although hearsay can form the basis for the issuance of a warrant there must be presented a substantial basis for the crediting of the hearsay and this basis can only be set forth by the affiant himself, setting forth reasons to his own knowledge of the informant(s) reliability and credibility based on past experience. This is not set forth in this affiant's affidavit.

We further submit to the court, where in the affidavit in question is there set forth any underlying circumstances upon which an independent magistrate could find a basis for probable cause?

In all of the prior decisions upholding the sufficiency of an affidavit in support of a search warrant, there was set forth underlying circumstances therein justifying the issuance.

In *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, the affidavit set forth that the informant had purchased narcotics at petitioner's apartment on many occasions, the last of which had been the day before the warrant was applied for. The affiant swore

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that his informant had given him information on prior occasions which was correct, and that the same information regarding petitioner had been given to the narcotics squad by other sources of information and that petitioner had admitted being a user of narcotics. There was personal knowledge and observation on the part of an informant who was reliable and hence a substantial basis for crediting the hearsay.

In *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723, the affidavit set forth a personal knowledge on the part of the affiant as to the petitioner's prior criminal activities for a period of four (4) years. Another officer had seized illicit whiskey from a house under petitioner's immediate control and the informant had purchased illicit whiskey from the petitioner's residence for a period of two (2) years, the most recent being within two (2) weeks of the issuance of the warrant and had personal knowledge of a purchase that was made within (2) days of the issuance and had observed prior sales by petitioner to himself and others. It was on the basis of these underlying circumstances and personal observations and knowledge of both the affiant and the informant, set forth in detail in the affidavit, that the search warrant was issued.

In *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684, the seizure of illicit whiskey was again involved. The affidavit set forth seven (7) different occasions in approximately two (2) months that the affiant observed a vehicle drive in petitioner's yard to the rear. On four (4) occasions he observed sixty (60) pound bags of sugar being unloaded. On two (2)

occasions he observed empty cans being unloaded. He further observed the loading of the vehicle with heavily laden cans. He also smelled the odor of fermenting mash and the sounds of pumps and machinery coming from petitioner's home. The affidavit in this instance thus being based on personal knowledge, information and observation was held to be sufficient.

Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887, rehearing denied 84 S.Ct. 1330, 377 U.S. 940, 12 L.Ed.2d 303, dealt with personal knowledge and observations on the part of the informant which underlying circumstances were set forth in the affidavit in support of the search warrant. The informant observed the stolen property and was told by petitioner that the property was in fact stolen.

These cases fall within the standards enunciated in Aguilar and Spinelli and hence could not have been held to be lacking in probable causes, however, these cases differ substantially from the facts set forth in the appellant's affidavit.

In the Petitioner's case, the affidavit contains no allegations, to the effect:

(1) That the informant(s) ever sold stolen property to the Petitioner;

(2) That the affiant had any personal knowledge of the Petitioner's criminal activity or reputation;

(3) That the affiant had received information from other sources in the past as to the criminal reputation or activities of the Petitioner;

(4) That the Petitioner had a prior criminal reputation;

(5) That the informant(s) was told by the Petitioner that he had stolen property or that the property was stolen;

(6) That the informant(s) was told by the Petitioner that he was dealing or fencing stolen property;

(7) That the affiant and/or informant(s) observed Petitioner in criminal activity;

(8) That the informant(s) has ever dealt with Petitioner in the past in criminal activity;

(9) That the informant(s) ever accompanied anyone to sell stolen property to the Petitioner;

(10) That the informant(s) saw others sell stolen property to the Petitioner;

(11) That the informant(s) saw stolen property in Petitioner's home;

(12) That the informant(s) knew of his own personal knowledge that in fact stolen property of any sort was being sold to Petitioner; or

(13) That the informant(s) ever transacted any business whatsoever with the Petitioner.

There is but a mere unsubstantiated allegation that Petitioner is a fence man for stolen property without support as to the underlying circumstances surrounding the statement. These are the same type of unfounded suspicions that were contained in affidavits found to be deficient in Aguilar and Spinelli. These bald, unsubstantiated suspicions and assertions are not sufficient to support probable cause and hence cannot form the basis for the issuance of a search warrant.

The affidavit in this instance does not set forth one (1) underlying circumstance as to how the informant(s) and/or the affiant knew or had reason to believe that there was stolen property in the Petitioner's residence. The simple averment of an officer, even though the belief of the officer is an honest one, as evidenced by his oath, and even though the magistrate knows him to be an experienced, intelligent officer who has been reliable in the past, these unsupported assertions or beliefs of the officer do not satisfy the requirements of probable cause. *Spinelli v. United States, Supra, Aguilar v. Texas, Supra., Gau v. United States,* 287 U.S. 124, 53 S.Ct. 38, 77 L.Ed. 212, *Byars v. United States,* 273 U.S. 28, 29, 47 S.Ct. 248, 71 L.Ed. 520.

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An analysis of the affidavit contained in Appendix 4, is as follows:

> "On 2-7-71 at approximately 9:05 a.m. an aggravated burglary was committed at 3784 Mimosa Street, New Orleans, La. The victim of the burglary was one Georgia B. Woodson of the above address. The property which was reported stolen was recovered by Ptn. Marshall and Thomas of the New Orleans Police Dept. The only property that was not recovered was one lawn hedger and misc. papers belonging to the above named victim. Officers were able to effect their arrest and recover the property stolen by use of a confidential informant."

There are no underlying circumstances set forth in the above statement referring to the Petitioner.

> "On following up the informant's information, Ptn Marshall and Thomas further learned (How and from Whom?) that the lawn hedger and the misc. papers belonging to the victim were sold to a subject by the name of Paul Paciera of 1042 West Mary Poppins Dr., Harvey, La. The informant also stated to the officers that Paul Paciera is a fence man for stolen property and that many of the known burglars often bring stolen property to Paciera to make their money for buying narcotics."

The source of the information that the hedger and the papers were sold to Paciera is not revealed and no

basis is given for gauging the credibility of that information. The affidavit's failure to state the source of this information and give surrounding facts which would tend to establish the reliability of the information received and the reliability of the source of the information substantiates the magistrate's *lack* of sufficient probable cause to issue the warrant. *See dissenting opinion of Justice Barham, State v. Paciera*, 290 So.2d 681, at pages 688, 689. Casual rumors circulating in the underworld as to criminal activity without being supported by underlying circumstances lending credence to these assertions, can never serve as a basis for probable cause. *Aguilar v. Texas, Supra., Spinelli v. United States, Supra.*

> "It should be noted that both Ptn. Marshall and Thomas are commissioned police officers of New Orleans Police Dept. and that they have several years of experience and that the informant they received their information from has been successful in the clearing up about 15 residence burglaries in the Algiers area. 9 of the 15 were with convictions and four of the other charges are pending in court."

No where in this part of the affidavit is it stated that the affiant knew of his own knowledge, the reliability and credibility of either the informant or the two (2) New Orleans police officers from which he received the information from, and the grounds upon which their reliability and credibility was known to him as required in Aguilar and Spinelli. The mere fact that an affiant swears that his confidant is reliable, without setting forth reasons in support of his conclusion, is

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insufficient to supply probable cause for the issuance of a search warrant. *Aguilar v. Texas, Supra*, and *Spinelli v. United States, Supra*.

> "On learning the above information the undersigned officer accompanied by Ptn Marshall and Thomas set up a stake out in the area of 1042 West Mary Poppins Dr., Harvey, La. The date of the stake out was 2-8-71. At approximately 2:40 p.m. the stake out was set up and at 9:30 p.m. the stake out was ended. In watching the residence several subjects were seen going to the residence of the subjects observed was Edward Johnson N/M 22 who is a known burglar from New Orleans, La."

There are no allegations contained herein that the officers observed any criminal activity transpiring during the period of the stake out or that any property was seen being brought to the Petitioner's residence. The statements contained are merely but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision. *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 12, 78 L.Ed. 159, *Spinelli v. United States, Supra*.

The majority opinion in *State v. Paciera, Supra.*, (Appendix 1), and the District Court which adopted their findings (Appendix 2), go to great lengths to find the affidavit in question within constitutional sufficiency. They seem to base the reliability issue on the theory that the informant (whoever that may be) was reliable as to the burglary, therefore he has to be reliable when he stated that Paciera had the other

stolen property from that burglary, regardless of the fact that the standards of *Aguilar* and *Spinelli* were not met. The fallacy of that argument is apparent. Once the so called informant was correct as to the burglary, he then could have supplied any name to the affiant and this would have been sufficient, without first showing reliability and/or underlying circumstances to credit and substantiate the statements he was making. *Aguilar v. Texas, Supra., Spinelli v. United States, Supra.*

The lower courts have made an attempt to cloud the issues and pronouncements made in *Jones v. United States, Supra., United States v. Harris, Supra.*, and *United States v. Ventresca, Supra.*, indicating that these cases modified the principles set forth in *Aguilar* and *Spinelli*. The distinction between those cases are that the former set forth both reliability and underlying circumstances where the latter did not, resulting in decision accordingly. The affidavits in *Ventresca, Jones, Harris*, and *Rugendorf*, were found sufficient to support a finding of probable cause because they met the standards set forth in *Aguilar* and *Spinelli*. They stated underlying circumstances sufficient for an independent magistrate to determine that there was reason to believe that the statement contained therein was true, hence establishing probable cause.

CONCLUSION

Petitioner respectfully submits that the ruling of the lower courts are in conflict with the Supreme Court decisions and therefore it is necessary and critically

important that this court grant Writs of Certiorari in connection with this case in order to set forth the proper guidelines to be used in an affidavit in support of a search warrant and thereby reverse the decision of the lower courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify copies of the foregoing petition have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ___ day of February, 1976.

LAWRENCE J. GENIN

APPENDIX I

STATE of Louisiana, Appellee,
v.
Paul A. PACIERA, Appellant.

No. 54032

Supreme Court of Louisiana.
Feb. 18, 1974.

TATE, Justice.

The defendant Paciera was convicted of receiving stolen things with knowledge they had been stolen, La.R.S. 14:69 (1950),[1] i.e. of being a "fence" for stolen things. He received a sentence of one year in the parish prison, suspended, and was fined one thousand dollars. On his appeal, he relies upon twelve bills of exceptions.

Motion to Suppress

The most serious issue of the appeal is presented by the bills (Nos. 1 and 2) taken to the denial of a motion to suppress certain evidence as illegally and unconstitutionally seized. The items were seized pursuant to a search warrant issued on the basis of an affidavit. The defendant contends that this affidavit does not provide a sufficient factual basis, as required, to justify issuance of a search warrant.

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1 La.R.S. 14:69 was amended by Act 654 of 1972, after the 1971 offense charged to the defendant. This amendment is the subject of a bill taken by the defendant to the denial of an amended motion for a new trial. See below.

Preliminarily, we should note that a Louisiana judge may issue a warrant authorizing the search for and seizure of specified things, including property which has been the subject of a theft. La.C.Cr.P. art. 161. Such search warrant "may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, *reciting facts establishing the cause* for issuance of the warrant." La.C.Cr.P. art. 162 (Italics ours.)

Under our jurisprudence, a search warrant may not be issued upon an affidavit reciting nothing more than the affiant has reasonable cause to *suspect* that the object of the search is in the premises. State v. Wells, 253 La. 925, 221 So.2d 50 (1969). The affidavit must recite *facts* establishing to the satisfaction of the judge, not the affiant, that probable cause exists for issuance of the search warrant. State v. Holmes, 254 La. 501, 225 So.2d 1 (1969); State v. Wells, cited above. If a search warrant is illegally issued by virtue of an insufficient affidavit, the evidence thereby illegally seized is inadmissible in a criminal prosecution. State v. Holmes and State v. Wells, cited above; see Professor Dale Bennett, 30 La.L.Rev. 309-10 (1969).

In the instant case, the defendant was charged with receiving a lawn-hedge mower and a box of tools stolen from the residence of Mrs. Georgia Woodson on February 7, 1971, along with other things. The hedger and tool box were recovered two days later in a search of the defendant Paciera's home, pursuant to a search warrant here questioned as illegal on the ground that the affidavit upon which it was based was insufficient.

The affidavit was executed by Detective Taffaro of the Jefferson Parish Sheriff's office. As shown more fully by its text as set forth in the margin,[2] after describing the premises for which the search warrant was requested, the facts set forth by the affiant are two-fold in nature:

1. Information obtained by him from Policemen Thomas and Marshall, experienced officers of the New Orleans Police Department, as follows: The Woodson residence in New Orleans had been burglarized.

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2 The text of the affidavit recites as follows:

"On 2-7-71 at approximately 9:05 A.M. an aggravated burglary was committed at 3784 Mimosa Street, New Orleans, La. The victim of the Burglary was one George G. Woodson of the above address. The property which was reported stolen was recovered by Ptn Marshall and Thomas of the New Orleans Police Dept. The only property that was not recovered was one lawn hedger and misc. papers belonging to the above mentioned victim. Officers were able to effect their arrest and recover the property stolen by use of a confidential informant. On following up the informants information Ptn Marshall and Thomas further learned that the lawn hedger and the misc. papers belonging to the victim were sold to a subject by the name of Paul Paciera of 1042 West Mary Poppins Dr. Harvey, La. The informant also stated to the officers that Paul Paciera is a fence man for stolen property and that many of the known burglars often bring stolen property to Paciera to make their money for buying narcotics.

"It should be noted that both Ptn Marshall and Thomas are commissioned police officers of New Orleans Police Dept. and that they have several years of experience and that the informant they received their information from has been successful in the clearing up of about 15 residence burglaries in the Algiers area. Nine of the fifteen were with convictions and four of the other charges are pending in court.

"On learning the above information the undersigned officer accompanied by Ptn Marshall and Thomas set up a stake out in the area of 1042 West Mary Poppins Dr. Harvey, La. The date of the stake out was 2-8-71. At approximately 2:40 P.M. the stake out was set up and at 9:30 P.M. the stake out ended. In watching the residence several subjects were seen going to the residence one of the subjects observed was Edward Johnson N/M 22 who is a known burglar from New Orleans, La.

"The above search is requested to recover the fruits of the above described crime."

Thomas and Marshall had recovered all of the stolen property except a lawn-hedger and miscellaneous papers. They had secured the information by which they had recovered such other property from a confidential informant, who had previously helped them solve about 15 residence burglaries. *These policemen had also learned, on following up the informant's information which led to the recovery of some of the stolen property, that the stolen hedger and papers were at the defendant Paciera's premises. They had also been informed by the informant that Paciera was a fence man for stolen property.* (The italicized sentences represent information obtained by the affiant by hearsay report rather than by direct personal observation or report.)

2. The affiant's own personal acts and observations in response to such information: These were a seven-hour surveillance of the Paciera premises, during which one known burglar, identifed by name, was seen going to the residence, as well as several other unidentified persons.

By itself, what the affiant personally observed — that he had seen a burglar visiting the Paciera residence, 2 above — does not constitute probable cause to justify a search of the Paciera residence; nor does the state contend otherwise. The real issue is whether the information received by the affiant firsthand from reliable informants (i.e., the New Orleans police officiers), along with this firsthand observation, can be considered sufficient probable cause for issuance of a search warrant.

The information furnished by the police officer informants to the affiant detective is of two natures: (a) that gleaned from *their* own personal observation and participation, being principally recovery of *other* property stolen in the Woodson burglary; and (b) that learned from a confidential informant, whom *they* (not the affiant, who never spoke to him) knew to be reliable for reasons shown with sufficient specificity, being information which led to recovery of part of the stolen property and further information gained in the same way that the remainder (the stolen hedger and papers) had been sold to Paciera, and information that the informant also told them that Paciera was a known fence. See the italicized sentences in paragraph 1 above, describing the contents of the affidavit.

The defendant attacks the facts thus shown by the affiant, particularly those denoted as (b), as being double- or triple-hearsay, so far as the magistrate was concerned, and as being in the nature of "a casual rumor circulating in the underworld or an accusation based merely on an individual's reputation", Spinelli v. United States, 393 U.S. 410, 416, 89 S.Ct. 584, 589, 21 L.Ed.2d 637 (1969). This sort of information is denoted by that decision as insufficient (in the absence of a description of "the accused's criminal activity in sufficient detail") to support a search warrant.

The complaint is not frivolous. Pretermitting for the moment the issue of double- or triple-hearsay, the contention might be well-founded *if* the New Orleans policemen themselves had only furnished information to the issuing magistrate that they had recovered some of the stolen property, by use of the proven infor-

mant, and that this informant had, with regard to Paciera, informed them only of his underworld reputation as a fence. Such latter information by itself does not give rise to probable cause to believe that the particular goods stolen are located at this particular defendant's residence, for no sufficient factual basis is shown by which it is more than rumor or naked accusation.

However, here, the information given to the police officers by the informant acquires credence of probable cause as to this particular suspect and as to these particular premises: The same informant had given information to *them* which led to *their* recovery of other property stolen in the *same* burglary and to information that the hedger stolen in this same burglary had been sold to Paciera and was on the Paciera premises. The information was thus indicated to be reliable as to *this* burglary.

The probable cause for a search furnished to these police officers is thus based on more than a casual rumor and on more than general reputation. It is rather based upon circumstances which indicate a factual basis reasonably to believe that the stolen hedger was on the Paciera premises, sufficient at least to justify a search if a warrant was secured.

But, the defendant further objects, these policemen themselves did not furnish the information to the magistrate who issued the search warrant. Rather, the affiant recited to the magistrate what the police officers had told the affiant (hearsay) that the informant had told them (double hearsay) and what the

policemen had learned by further unidentified means or from further unidentified sources.

The issue may be close, but we prefer rather to characterize the facts recited by the affiant as follows: The affiant had learned from reliable policemen-informants that the particular stolen property was on the Paciera premises, with the reliability of the information thus obtained being evidenced by the *specific facts* set forth showing that these policemen had *personally* recovered some of the property stolen in the *same* burglary by the identical means that they had learned that the particular stolen property was on the Paciera premises. Further, some very slight corroboration to this information (and the related information that Paciera was a known fence) was furnished when the affiant personally observed a known burglar visiting the Paciera premises.

In holding the affidavit sufficient, we are influenced to some extent by the circumstance that the affiant specifically named the reliable informants (the policemen) who furnished him the hearsay information as to the location of the stolen property, in addition to furnishing the specific detail indicating the probable reliability of such information as given to *them* by the confidential informant.

In the first place, assuming that the depiction of the issuing magistrate carefully scrutinizing the affidavit before he signs the search warrant is more than an appellate fiction,[3] the specificity of the data naming

3 But see, Tiffany, McIntyre, and Rotenberg, Detection of Crime 118-20 (1967).

the source of the information is some assurance of its reliability and permits the magistrate a means of easy informal verification if in doubt. In the second place, some protection against deliberate governmental inaccuracy is thus assured, since the truthfulness as to the source ascribed (if in doubt) may easily be verified at a hearing on a motion to suppress. State v. Melson, 284 So.2d 873 (La.Sup.Ct. 1973); see also Note, 33 La.L.Rev. 339 (1973).

We believe, on the basis of all the reasons outlined above, that the affidavit used to secure the present search warrant does not offend federal Fourth Amendment standards as outlined by the United States Supreme Court. United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). See also: The Supreme Court, 1970 Term, 85 Harv.L.Rev. 53-64 (1971); Annotation, Search Warrant — Hearsay, 10 ALR3d 359 (1966).

If we can deduce a rule from these cases, it is this: The affidavit submitted to the magistrate may be based entirely upon hearsay, but, if so, it must set forth underlying circumstances and details sufficient to provide a substantial factual basis by which the magistrate might find reliable *both* the informant and the information given by him. Factors which support the credibility of an *un*identified infor*mant* include prior accurate reports or any specific independent

corroboration of the accuracy of the instant report. Factors which support the creditability of the information reported include (a) direct personal observation by the informant, or (b), if the information came indirectly to the informant, the reasons in sufficient factual detail for the magistrate to evaluate and credit the reliability both of the indirect source and of the indirectly-obtained information. See State v. Linkletter, 286 So.2d 321 (La.Sup.Ct. 1973).

The present affidavit provides a factual basis in sufficient detail by which a magistrate might have good reason to determine reliable both (1) the identified experienced police officer informants, who had recovered part of the property stolen in the same burglary, and (2) the information received from them that the rest of the stolen property was at the Paciera residence. The reliability of the latter information, received by the informants by following up information from an unidentified person, might be determined by the magistrate on the basis that (2) this person had given the police officers at the same time information which had led them to recover part of the property stolen in the same burglary, as partially corroborated by (b) the proven past accuracy (insofar as the officer informants were concerned) of this unidentified person.

Nevertheless, the defendant points out the absence of a showing in the affidavit as to how the police officers had learned, from following up the informant's information, that the lawn-hedger was at Paciera's residence. The defendant cites *Spinelli* as authority for his contention that, even though partially cor-

roborated by other information obtained elsewhere, the basis of an informant's conclusory knowledge must be shown, so as to enable the detached magistrate to make an independent evaluation of whether the underlying circumstances warranted the conclusion reached by the informant.

Spinelli offers some support to the defendant's position. However, it concerned an instance where the naked conclusion of an unidentified informer, as well as impermissible general reputation, served as the only basis in the affidavit for a conclusion of unlawful activity (although, once having accepted the conclusion, otherwise innocently explainable information corroborated the conclusion).

To the contrary, the present affiant's *identified* informants (the New Orleans policemen) testified from their personal knowledge that they had recovered some of the property stolen in the Woodson burglary through information given them by an informant of shown-proven reliability. This same (unidentified) informant had at the same time given them information by means of which they learned that the remaining stolen property had been purchased by Paciera and was at his residence. As stated by *Spinelli*, approving an affidavit in a cited decision: "A magistrate, when confronted with such detail, could reasonably infer that the informant (i.e., here, the policemen) had gained his information in a reliable way." 393 U.S. 417, 89 S.Ct. 589.

We are strenthened in our conclusion by *Harris*, the latest expression of the United States Supreme Court

cited to us. The court's plurality opinion distinguished *Spinelli* on the ground that the affidavit there failed to explain how the affiant's unidentified informant came by his information.[4] Citing *Jones*, the opinion noted the sufficiency of an affidavit, even if based entirely upon hearsay, when the detailed and specific showing made by it afforded a "substantial basis" for crediting the hearsay due to corroborating circumstances shown. 430 U.S. 580-581, 91 S.Ct. 2080, 29 L.Ed.2d 723. Citing *Ventresca*, the opinion noted that technical requirements of elaborate specificity have no proper place in the measurement of the sufficiency of affidavits, drafted as they are by nonlawyers in the midst and haste of a criminal investigation.[5] 403 U.S. 577, 91 S.Ct. 2079, 29 L.Ed.2d 723.

As *Spinelli* observed, "in judging probable cause magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense" and "their determination of probable cause should be paid great deference by reviewing courts." 393 U.S. 419, 89 S.Ct. 590. Further, where the law enforcement officers have respected the constitutional mandate to secure a warrant before searching, "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of

4 Here, the affiant's informants were identified, i.e., the policemen. These informants had some firsthand corroboration, i.e., recovery of part of the stolen property, of the accuracy of their own informant.

5 Thus, although inarticulately stated, the affidavit's conclusion that the unidentified informant had "*also*" stated that Paciera was a known fence might have led the magistrate to believe that this unidentified informant had (also) told the policemen that some of the stolen property was at the Paciera premises at the same time he told them where the other property was located.

doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Ventresca*, at 380 U.S. 109, 85 S.Ct. 746. See also *Jones* at 362 U.S. 270, 80 S.Ct. 735-736.

For the foregoing reasons, we do not find merit in these bills of exceptions.

Amended Motion for a New Trial

Of the remaining bills of exceptions prefected, only the final bill, that taken to the denial of an amended motion for a new trial, requires more than passing comment. This bill arises from the following circumstance:

The defendant is charged with receiving in 1971 stolen goods valued at sixty dollars, a violation of La.R.S. 14:69. He was tried in 1973 and convicted by a five-man jury.

At the time of the offense, the receipt of stolen goods valued at between twenty and one hundred dollars was punishable by imprisonment up to two years with or without hard labor, a "relative" felony triable by a jury of five, all of whom must concur in the verdict. La.Const. Art. VII. Section 41 (1921); La.C.Cr.P. art. 782. The penal statute was amended by Act 654 of 1972 so as to reduce the penalty for receiving stolen goods valued at one hundred dollars or less to imprisonment (without hard labor) for not more than six months, a misdemeanor triable by a judge without a jury. La.Const. Art. VII. Section 41 (1921); La.C.Cr.P. arts. 779, 933. The maximum fine for the offense prior to the

1972 amendment was one thousand dollars, after the amendment five hundred dollars.

The grounds alleged include that the 1971 penalty allowable for the offense for which charged is more severe than that permissible by the 1972 amendment and that the defendant was denied due process and the equal protection of the laws by being subject to a more severe penalty than that allowed by the present law.

In denying the motion, the trial court pointed out that the 1972 amendatory act had specifically provided: "This Act shall not apply to any crimes committed before the effective date of this Act. Crimes committed before that time shall be governed by the law existing at the time the crime was committed."

The repeal, re-enactment, or amendment of a penal statute does not extinguish or alter the liability for penalty of the former statute, unless the legislature so intends. La.R.S. 24:171; State v. Kent, 262 La. 695, 264 So.2d 611 (1972); State v. Cryer, 262 La. 575, 263 So.2d 895 (1972); State v. Bowie, 221 La. 41, 58 So.2d 415 (1952). (Here, of course, the legislature by express savings clause provided for retroactivity of the previous penalty.) By similar legislative provision and jurisprudential pronouncement, this is the general rule in other modern American jurisdictions, Bradley v. United States, 410 U.S. 605, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973), 22 C.J.R. Criminal Law § 26; 24 C.J.S. Criminal Law § 1982e, although the rule may have been different at common law, see Bell v. Maryland, 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed.2d 822 (1964) and

United States v. Tynen, 78 U.S. 88, 11 Wall. 88, 20 L.Ed. 153 (1871). See Comment, 121 U.Pa.L.Rev. 120 (1972).

No authority is cited by the defendant in support of his contention that due process or equal protection rights are offended when the amendatory statute continues or lessens the penalties proscribed for his conduct by the former act. In the absence of further reason than the bald assertion, we are unable to find merit to the contention.

Other Bills

The remaining bills do not require extended discussion: Bill Nos. 3, 6, 7, 8, and 9 deal with the alleged irrelevancy of certain state evidence, but the objections were correctly overruled for reasons noted by the trial court; Bill No. 4 concerns the sustaining of an objection by the state to a question to a witness about a nationwide policy of his employer prior to his employment; and Bill No. 10 was perfected as to the failure of the court to give two requested special charges (on reasonable doubt and on the duty of a juror to vote his own convictions), which were however adequately covered in the trial court's general charge. Likewise, the motion for the new trial was properly denied, and the bill taken to this denial is without merit.

The trial court may have erred in sustaining as irrelevant an objection to a question to the defendant as to his financial worth (apparently intended to show that a man of his worth would not have engaged in recieving stolen goods). However, if error was com-

mitted, it was harmless. for "the probative value of evidence as to the wealth of one accused of theft or receiving stolen things is to slight that it can hardly be said that its exclusion is prejudicial to the substantial rights of the accused". State v. Murphy, 234 La. 909, 102 So.2d 61, 63 (1958). See La.C.Cr.P. art. 921.

Decree

For the reasons assigned, we affirm the conviction and sentence.

Affirmed.

BARHAM, JR., disents and assigns reasons.

DIXON, J., dissents. The affidavit does not disclose source of the information that the stolen goods were in defendant's premises.

BARHAM, Justice (dissenting).

I cannot agree with the majority's finding in this case that there existed sufficient probable cause upon which a valid search warrant could issue. The crucial issue requiring resolution is: Did the issuing magistrate have before him an adequate basis for determining that probable cause existed to believe that the home of defendant, Paul A. Paciera, contained a lawn hedger and miscellaneous papers, the only two items taken in the burglary of a particular residence which had not then been recovered by law enforcement officers.

The arrest of the perpetrator(s) of the burglary and the recovery of all the stolen property (except the lawn hedger and the papers) were effected when the arresting officers acted on the tip of an unidentified informant. This information, however, does not appear to me to have *any* rational relationship to a belief that the remaining unrecovered stolen goods were contained in the Paciera residence. The affidavit recites: "* * * On following up the informants [sic] information, Ptn Marshall and Thomas further learned [how and from whom?] that the lawn hedger and the misc. papers belonging to the victim were sold to a subject by the name of Paul Paciera of 1042 West Mary Poppins Dr. Harvey, La. The informant also stated to the officers that Paul Paciera is a fence man for stolen property and that many of the known burglars often bring stolen property to Paciera to make their money for buying narcotics." The *source* of the information that the hedger and the papers were sold to Paciera is *not revealed* and no basis is given for gauging the credibility of that information. Since it is my belief that this information alone, if credible, may be seen as providing a basis for a finding of probable cause, the affidavit's failure to state the source of this information and give surrounding facts which would tend to establish the reliability of information received and the reliability of the source of the information impels me to conclude that the magistrate in this case did not have sufficient probable cause to issue the search warrant.

The case of United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971), heavily relied upon by the majority in its approval of the affidavit in this

case, does not, in my opinion, support approval of the affidavit. In the Harris case it is noted that the affidavit there under consideration recounted *personal and recent* observations of criminal activity by the unidentified *informant*, "* * * factors showing that the information had been gained in a reliable manner, and serving to distinguish both tips from that held insufficient in Spinelli, * * * in which the affidavit failed to explain how the informant came by his information. * * *" In the case under consideration, the only "personal and recent" observation related was that of the police officers-informants, and the *only* thing they personally observed was the visit of one "known" burglar to the home of defendant during the period of a 7-hour stake-out, *during which time there were several other visitors to the defendant's home.* No "personal or recent" observations of the unidentified informant were recounted; the affidavit only states the unidentified informant's unsupported statement that defendant "* * * is a fence man for stolen property and that many of the known burglars often bring stolen property to Paciera to nake their money for buying narcotics."

While it is true, as the majority notes, that the unidentified informant here had given information to the police officers-informants which proved to be reliable as to the subject burglary, no information was given by the unidentified informant which would lend any credibility or reliability to the source of the information regarding defendant's connection with the stolen goods or which would indicate what the source was or whether the source itself was reliable. The majority states: "The affiant had learned from reliable

policemen-informants that the particular stolen property was on the Paciera premises, with the reliability of the information thus obtained being evidenced by the *specific facts* set forth showing that these policemen had *personally* recovered some of the property stolen in the *same* burglary by the identical means that they had learned that the particular stolen property was on the Paciera premises. * * *" It is my opinion that this statement by the majority draws incorrect conclusions from the facts set forth in the affidavit. I do not believe that the fact that the information given by the unnamed informant to the police-informants led to recovery of some of the stolen property from the Woodson burglary in any way evidences the reliability of the information received from *some unspecified source* that defendant was in possession of other stolen things from the same robbery. As far as the affidavit shows, it appears to me that the means by which the police-informants secured information leading to recovery of the stolen goods and the means by which the police secured information that Paciera was in possession of others of the stolen items are not at all shown to be identical.

It is my belief that Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) should control here. The information that defendant had the stolen items from the Woodson burglary in his possession was inadequate to support probable cause because the affidavit did not set forth *any* underlying facts which tended to establish the reliability of the unspecified source of the information or of the information itself. The statements accepted by the majority as corroborating the crucial information do not have any

logical connection to the central issue for determination by the magistrate; that is, whether there was probable cause to believe that defendant had the stolen property in his possession at his residence. The information regarding defendant's reputation as a fence for stolen property presented in the affidavit was unsubstantiated and was not defendant's reputation with either the affiant or the police-informants, but with the unidentified informant.

Being of the opinion that the affidavit did not set forth sufficient probable cause for the issuance of the search warrant and that the defendant's motion to suppress was therefore erroneously denied, I must respectfully dissent from the affirmance of this defendant's conviction and sentence.

APPENDIX II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PAUL A. PACIERA, JR.	NO. 74-1391
VS.	CIVIL ACTION
STATE OF LOUISIANA	SECTION G

Paul A. Paciera, Jr. filed a petition for writ of habeas corpus seeking to set aside his conviction of receiving stolen things (valued at sixty dollars) with knowledge they had been stolen, La. R. S. 14:69, i.e. of being a "fence" for stolen things. He received a sentence of one year in the Jefferson Parish Prison, suspended, was

placed on two years active probation and was fined one thousand dollars.

Petitioner alleges that he is being held in custody unlawfully and seeks to set aside his conviction on the following grounds:

1. His Fourth Amendment rights were violated in that there was an unlawful search and seizure of his residence. Petitioner alleges that the application for the search warrant failed to meet the requirements of law as set forth in *Aguilar v. Texas*, 84 S.Ct. 1509(1964) and *Spinelli v. U.S.*, 89 S.Ct. 584(1969) in that:

(a) The application failed to set forth in detail the underlying circumstances necessary to enable a Magistrate to independently judge the validity of the informant's conclusion and;

(b) The affiant failed to set forth circumstances of the credibility and reliability of his informant.

2. He was denied due process of law and equal protection of the law as guaranteed by the Fourteenth amendment to the United States Constitution when he was convicted of a felony which, subsequent to the alleged violation, was reclassified and reduced to a misdemeanor by the Louisiana Legislature.

The conviction was affirmed by the Louisiana Supreme Court. The two issues that petitioner brings in this petition were raised by Bills of Exceptions reserved at trial and were ruled on adversely to the

petitioner by the Louisiana Supreme Court. *State v. Paciera*, 290 So.2d 681 (La. Sup. Ct. 1974).

Since the attack by petitioner is based on constitutional grounds as envisioned by 28 U.S.C. §2254(a) and since petitioner has exhausted his available state court remedies, 28 U.S.C. §2254(b), the petition is properly before this Court.

After a complete review of the record, the application for the issuance of a search warrant, memoranda and briefs that were submitted and the jurisprudence, this Court is in agreement with the disposition of these issues by the Louisiana Supreme Court for the reasons stated in the majority opinion. *State v. Paciera, supra*. The petition for habeas corpus is therefore denied.

December 30, 1974

/s/ (ILLEGIBLE)
UNITED STATES DISTRICT JUDGE

Paul A. Paciera, Jr.
Attorney General

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PAUL A. PACIERA, JR.

VS.

STATE OF LOUISIANA

No. 74-1391
CIVIL ACTION
SECTION "G"

JUDGMENT

The Court having on December 30, 1974, denied the application of Petitioner for Writ of Habeas Corpus;

IT IS ACCORDINGLY, ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, State of Louisiana, and against the petitioner, Paul A. Paciera, Jr., dismissing the latter's application for Writ of Habeas Corpus.

New Orleans, Louisiana, this ____ day of January, 1975.

/s/ (ILLEGIBLE)
UNITED STATES DISTRICT JUDGE

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1476

PAUL A. PACIERA, JR.,
Petitioner-Appellant,
versus

STATE OF LOUISIANA,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

November 12, 1975

Before GOLDBERG and AINSWORTH, Circuit Judges, and NICHOLS,* Associate Judge.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

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* Of the U.S. Court of Claims, sitting by designation.

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX IV

IN THE 24th Judicial Court JPSO ITEM # 2-2329-71
PARISH OF JEFFERSON
STATE OF LOUISIANA

APPLICATION FOR AND SWORN PROOF OF PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT HEREIN

PERSONALLY CAME AND APPEARED BEFORE ME, the undersigned Judge of the 24th Judicial Court, Parish of Jefferson, State of Louisiana, Detective Craig A. Taffaro of the Jefferson Parish Sheriff's Office, who, upon being duly by me sworn, depose(s) and say(s):

THAT A SEARCH WARRANT SHOULD BE ISSUED FOR THE SEARCH OF the residence and curtilage at 1042 West Mary Poppins Dr. Harvey, La. this being a one (1) story type dwelling, Double Residence, with a reddish brown brick structure trimmed in white . . . .

FOR THE FOLLOWING REASONS:

On 2-7-71 at approximately 9:05 AM an aggravated burglary was commited at 3784 Mimosa Street, New Orleans, La. The victim of the burglary was one Georgia B Woodson of the above address. The property which was reported stolen was recovered by Ptn Marshall and Thomas of the New Orleans Police Dept. The only property that was not recovered was one lawn hedger and misc. papers belonging to the above

mentioned victim. Officers were able to effect their arrest and recover the property stolen by use of a confidential informant. On following up the informants information Ptn Marshall and Thomas further learned that the lawn hedger and the misc papers belonging to the victim were sold to a subject by the name of Paul Paciera of 1042 West Mary Poppins Dr Harvey, La. The informant also stated to the officers that Paul Paciera is a fence man for stolen property and that many of the known burglars often bring stolen property to Paciera to make their money for buying narcotics.

It should be noted that both Ptn Marshall and Thomas are commissioned police officers of New Orleans Police Dept. and that they have several years of expierence and that the informant they received their information from has been successful in the clearing up of about 15 residence burglaries in the Algiers area. Nine of the fifteen were with convictions and four of the other charges are pending in court.

On learning the above information the undersigned officer accompanied by Ptn Marshall and Thomas set up a stake out in the area of 1042 West Mary Poppins Dr Harvey, La. The date of the stake out was 2-8-71. At approximately 2:40 PM the stake out was set up and at 9:30 PM the stake out ended. In watching the residence several subjects were seen going to the residence one of the subjects observed was Edward Johnson N/M 22 who is a known burgular from New Orleans, La.

The above search is requested to recover the fruits of the above described crime.

Note the New Orleans Police Item # in which the reports of the burglary are filed under B-5478-71.

/s/ CRAIG A. TAFFARO
Detective Craig A. Taffaro
JEFFERSON PARISH SHERIFF'S OFFICE

COPIES:
1-Judge Signing
1-District Attorney
1-Criminal Records Room
1-Officer Case File

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 9th DAY OF
Feb 1971.
/s/ CHARLES GAIRD(?)
JUDGE:
PARISH OF JEFFERSON
STATE OF LOUISIANA

24TH JUDICIAL COURT FOR THE
PARISH OF JEFFERSON
STATE OF LOUISIANA

SEARCH WARRANT

AFFIDAVIT(S) HAVING BEEN MADE BEFORE ME BY Detective Craig A Taffaro, of the JEFFERSON PARISH SHERIFF'S OFFICE, that he has a good reason to believe that on or in the premises or curtilage at 1042 West Mary Poppins Drive, Harvey, Louisiana, this being a one (1) story type dwelling, Double residence with a reddish brown brick structure trimmed in white, located within the Parish of Jefferson, State of Louisiana, there is now being concealed certain property, namely, one law hedger, misc. jewelry, and papers belonging to Georgia Woodson. which said property constitutes evidence of the violation of RS 14:69, of the Louisiana Revised Statutes, and as I am satisfied from the affidavit(s) submitted in support of the application for this warrant that there is probable cause to believe that the aforesaid property is being concealed on or in the premises or the curtilage above described, and that the aforesaid grounds for the issuance of this search warrant exist: YOU ARE HEREBY ORDERED to search forthwith the aforesaid premises and curtilage for the property specified, serving this search warrant and making the search during the daytime or the night time, Sundays or holidays, and if the property be found there, to seize it, leaving a copy of this warrant and a receipt fo the property seized, to make your written return on this warrant including a written inventory of the property seized, and to bring the said seized property before me within ten (10) days of this date, as required by law.

Jefferson Parish, LOUISIANA
DATED THIS 9th DAY OF Feb 197—.

/s/ CHARLES GAIRD(?)
JUDGE
24th JUDICIAL COURT,
PARISH OF JEFFERSON,
STATE OF LOUISIANA

COPIES:
1-Person Upon Whom Warrant is Served
1-Judge Signing the Warrant
1-District Attorney
1-Records Division
1-2nd Copy (When Making Return) to Judge Who Signed the Warrant

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1137

PAUL A. PACIERA, JR.,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1137

PAUL A. PACIERA, JR.,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REASONS FOR DENYING WRIT

In order to place the concept of probable cause in its proper perspective a few general considerations should be noted at the outset. Probable cause under the Fourth Amendment exists where the facts and circumstances are within the affiants knowledge, and of which he has reasonable trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 288. One of the basic guidelines given by the United States Supreme Court for determining what constitutes a showing of probable cause is found in *Nathanson v. United States*,

290 U.S. 41, 54 S. Ct. 11 (1933). In *Nathanson*, a warrant was issued upon the sworn allegation that the affiant had cause to suspect and did believe that certain merchandise was in a specified location. The court noted that the affidavit stated only a mere affirmation of suspicion and belief without any statement of adequate supporting facts, and announced the following rule:

> "Under the Fourth Amendment an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." 290 U.S. at 47, 54 S.Ct. at 13.

In *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245 (1958) the affiant swore that the defendant did receive and conceal narcotic drugs with knowledge of unlawful importation and the court stated the guiding principles to be:

> "That the inferences from the facts which lead to the complaint must be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 669. The purpose of the complaint, then, is to enable the appropriate magistrate to determine whether the probable cause required to support a warrant exists. The commissioner must judge for himself the persuasiveness of the facts relied on by a com-

> plaining officer to show probable cause. We should not accept without question the complainant's mere conclusion, 357 U.S., at 486, 78 S. Ct. at 1050."

The following cases will attempt to explore the various tests this Court has used in determining whether or not a showing of probable cause has been established.

Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960) involved a prosecution for the violation of federal narcotic laws. The petitioner claimed the affidavit was insufficient to establish probable cause because it did not set forth the affiant's personal observations regarding the presence of narcotics in petitioner's apartment, but rested wholly on hearsay. The affiant claimed no direct knowledge of the presence of narcotics in the apartment but swore that he had been given information by an unnamed informant that the petitioner kept narcotics at his apartment and that the informant had on many occasions bought narcotics from petitioner at the location. The affiant also swore that the informant had given information on previous occasions which was correct and that the same information regarding petitioner had been given the narcotic squad by other sources of information and that petitioner was a known user of narcotics. The court upheld the validity of the warrant and stated the following:

> "* * * The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it

sets out not the affiant's observations but those of another. An Affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.

In testing the sufficiency of probable cause for an officer's action even without warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is *reasonably corroborated by other matters within the officer's knowledge.*

What we have ruled in the case of an officer who acts without a warrant governs our decision here. If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant. If evidence of a more judicially competent or presuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimatize police conduct, and resort to them would ultimately be discouraged. Due regard for the safe-guards governing arrests and searches counsels the contrary. In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant so that the evidence in possession of the police may be weighed by an

> independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded."
>
> *We conclude therefore that hearsay may be the basis for a warrant.* (Emphasis added.) 362 U.S. at 269-271, 80 S.Ct. 755-56.

The court in *Jones* went on to note that the commissioner did not have to be actually convinced of the presence of narcotics in the apartment, but that there was a substantial basis for him to conclude that narcotics were probably present in the apartment and that was sufficient. 362 U.S. 270, 271, 80 S.Ct. 725, 736.

In *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965) the court applied the rationale of *Jones*, supra, and upheld the validity of the search warrant. In this case the defendant was convicted of possessing and operating an illegal distillery. The affidavit alleged that large amounts of sugar were taken to the defendant's house by automobile on several occasions, that five-gallon cans were also seen being taken to the house, and that federal investigators smelled the odor of fermenting mash on two occasions when they walked past the house. The affiant swore that the information was based upon his personal knowledge and from information obtained from federal investigators assigned to the case. The court made the following observation:

> "* * * While a warrant may be issued only upon a finding of probable cause, this court has long held that the term probable cause means less than evidence which would justify condemnation, and that a finding of probable cause may rest upon evidence which is not legally com-

petent in a criminal trial. 380 U.S. at 107, 85 S.Ct. 747.

— the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a *commonsense and realistic fashion*. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. *However, where these circumstances are detailed, where reason for crediting the source of this information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by in-*

> *terpreting the affidavit in a hypertechnical rather than a commonsense, manner.* Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded warrants." 380 U.S. at 108, 109, 85 S. Ct. at 746. (Emphasis added).

The court held in this case that the affidavit, if read in a commonsense way rather than technically showed sufficient facts to establish probable cause, and also noted that the affidavit was detailed and specific and set forth many of the underlying circumstances. Furthermore the U.S. Supreme Court pointed out that observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. 380 U.S. 102, 108-112, 85 S. Ct. 741, 746-747

In *Harris v. United States*, 403 U.S. 575, 91 S. Ct. 2075 (1971) the U.S. Supreme Court looked to the totality of the circumstances in determining that there was a substantial basis for a finding of probable cause for the affidavit stated that he had a reputation for trafficking in illegal spirits; that on a prior occasion the the affidavit stated that he had had a reputation for trafficing in illegal spirits; that on a prior occasion the local police had located illicit whiskey in an abandoned house under defendant's control; that the affiant had received sworn oral information from a confidential informant, who feared for his life should his name be revealed, that he had purchased whiskey from

defendant's residence repeatedly over a period of two years; and that the informant asserted that he knew of another person who bought whiskey from defendant's house within the past two days. The Circuit Court had reversed petitioner's conviction on the grounds that the affidavit was insufficient because no information was presented to enable the magistrate to evaluate the informant's reliability or trustworthiness and therefore inadequate under *Aguilar*, and relying on *Spinelli*, determined that the remaining allegations of the affidavit failed to supply independent corroboration. The Supreme Court, however, noted that the personal and recent observations of the informant of criminal activity showed that the information had been gained in a reliable manner *which the tip failed to do in Spinelli*. The court cautioned about being hypertechnical in requiring an affidavit to show probable cause even though there was no reference to the informer's reliability.

> "* * * While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a factual basis for creating the report of an unnamed informant, we conclude that the affidavit in the present case contains an ample factual basis for believing the informant which, when coupled with affiant's own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant." 403 U.S. at 579-580, 91 S. Ct. 2080.

The court then distinguished the case at hand and *Jones* from *Spinelli:*

> "* * * *Aguilar* cannot be read as questioning the 'substantial basis' approach of *Jones*. And unless *Jones* has somehow, without acknowledgment, been overruled by *Spinelli*, there would be no basis whatever for a holding that the affidavit in the present case is wanting. The affidavit in the present case, like that in *Jones*, contained a substantial basis for crediting the hearsay. Both affidavits purport to relate the personal observation of the informant — a factor that clearly distinguishes *Spinelli*, in which the affidavit failed to explain how the informant came by his information. Both recite prior events within the affiant's own knowledge — the needle marks in *Jones* and Constable Johnson's prior seizure in the present case — indicating that the defendant had previously trafficked in contraband. These prior events again distinguish *Spinelli*, in which no facts were supplied to support the assertion that Spinelli was 'known * * * as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.' " 403 U.S. at 581, 91 S.Ct. at 2081

The court also held that reputation, while standing alone was insufficient to establish probable cause, *Nathanson v. United States*, 290 U.S. 41, 54 S. Ct. 11 (1933), but was not irrelevant when supported by other information. Furthermore, the court observed that it is a practical consideration upon which a magistrate may properly rely in assessing the reliability of an informant's tip.

> "* * * To the extent that *Spinelli* prohibited the use of such prohibitive information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation." 403 U.S. at 583, 91 S. Ct. 2082.

The court also held that there was another reason for crediting the informant's tip in that the affidavit recited the extrajudicial statements of a declarant who, not only feared for his life, but also admitted his commission of a crime which carried its own indicia of credibility.

Article 162 of the Louisiana Code of Criminal Procedure provides that a search warrant be issued only upon probable cause established to the satisfaction of the judge by the affidavit of a credible person reciting facts establishing cause for the issuance of the warrants. The proof required to establish probable cause for issuance of a warrant is less than the amount of evidence which would justify condemnation. *Loche v. U.S.*, 7 Cranch 339, 3 L. Ed. 364.

The Supreme Court of the United States in considering the question of probable cause for the issuance of a search warrant has held the basis for such probable cause may rest upon evidence which is not legally competent in a criminal trial. *Draper v. United States*, 358 U.S. 307. In *Brinegar v. U. S.*, 338 U.S. 160, 176, 93 L. Ed. 1879, 1890, 69 S. Ct. 1302 (1949), the court held that "there is a large difference between the two things to be proved — guilt and probable cause — as well as between the tribunals which determine them and therefore a like difference in the quanta and modes of the proof required to establish them."

Thus, hearsay may be the basis for issuance of a warrant so long as there is a substantial basis for accrediting of the hearsay. *Jones v. United States*, 362 U.S. 257, and in *Aguilar* we recognize that an affidavit may be based on hearsay information that need not reflect the direct personal observations of the affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiants conclusions and his belief that any informant involved whose identity need not be disclosed was credible or his information reliable.

The court in *Ventresca*, supra, stated that affidavits of search warrants such as the ones involved here must be tested and interpreted by the magistrate in the courts in a commonsense and realistic fashion. They are normally drafted by non-lawyers in the midst of the haste of a criminal investigation. Technical requirements of elaborate specificity once enacted under a common law "pleading" have no proper place in this area.

In *Berger v. New York*, 338 U.S. 41, the Supreme Court held that probable cause under the Fourth Amendment exists when the facts and circumstances within the affiant's knowledge and of which he has reasonable cause to believe that an offense has been, or is being committed.

Petitioner relies mainly on the cases of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 and *Spinelli v. U.S.*, 393 U.S. 410, 89 S. Ct. 584. Because Fourth Amendment cases of reasonableness or probable cause necessarily rest on the facts and circumstances of each case

the State contends that the facts of the case at bar take the instant case beyond the rule of *Aguilar* and *Spinelli*.

In *Aguilar*, the search warrant stated only that they "have received reliable information from a credible person." In the instant case, the affiant stated in the affidavit that the "informant they received their information from has been successful in the clearing up on about 15 residence burglaries in the Algiers area. Nine of the fifteen were with convictions and four of the other charges are pending in the court." Thus, in the instant case, the affiant has laid grounds upon which the reliability and credibility of the information is based.

Also, the totality of the circumstances upon which the officer relied is certainly pertinent to the validity of the warrant. Hence, the affidavit here is a far cry from "mere suspicion" of "affirmance of belief", and not only because it was based on a reliable informer, but also on *personal surveillance by the affiant himself*. THE COURT IN *AGUILAR* WAS CAREFUL TO POINT OUT THAT ADDITIONAL INFORMATION OF THE KIND PRESENTED IN THE AFFIDAVIT IN THE INSTANT CASE WOULD BE HIGHLY RELEVANT: "IF THE FACT AND RESULTS OF SUCH A SURVEILLANCE HAD BEEN APPROPRIATELY PRESENTED TO THE MAGISTRATE, THIS WOULD OF COURSE, PRESENT AN ENTIRELY DIFFERENT CASE." 278, U.S. at 109, N.1., 12 L.Ed. 2d at 725. See *U. S. v. Eisner*, 297 F. 2d 595, Sup Ct. denied cert. 82 S. Ct. 947, *Evans v. U. S.*, 242 F. 2d 534, S. Ct. denied cert. 77 S. Ct. 1059,

U. S. v. Ramirez, 279 F. 2d 712, 715, *U. S. v. Meeks*, 313 F. 2d 464.

This Court denied certiorari in *Eisner*, although the affidavit there stated only that "information has been obtained by S. A. Clifford Anderson . . . which he believes to be reliable . . . , 297 F. 2d at 596 and in *Evans*, where the affiant was a man who "came to the headquarters of the federal liquor law enforcement officers and stated that he wished to give information . . . ," 242 F. 2d at 535.

In *Carroll v. U. S.*, 267 U.S. 132, 162, 69 L.Ed. 543, 556, 45 S. Ct. 280 (1925) the court found that probable cause exists where "the facts and circumstances within their (the officers) knowledge and of which they had reasonable trustworthy information (are) . . . sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

In *Brinegar v. U. S.*, 338 U.S. 160, 176, 93 L.Ed. 1879, 1890, 69 S. Ct. 1302 (1949) Mr. Justice Rutledge stated that "these long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusion of probability. THE RULE OF PROBABLE CAUSE IS A PRACTICAL

NON-TECHNICAL CONCEPTION AFFORDING THE BEST COMPROMISE THAT HAS BEEN FOUND FOR ACCOMMODATING THESE OFTEN OPPOSING INTERESTS, requiring more would unduly hamper law-enforcement." As Justice Clark states in his dissenting opinion in *Aguilar*, "there is no rigid academic formula for the unrigid standards of reasonable and probable cause laid down by the Fourth Amendment. This would lead to an obstruction of the administration of criminal justice."

The court in *Spinelli, supra*, stated that in the absence of a statement detailing the manner in which the information was gathered by the informant, it is especially important that the tip be described so that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

> The Court should look to the totality of the circumstances in determining that there was a substantial basis for a finding of probable cause for issuance of the warrant.

In the instant case, the informer stated to the officers "THAT PAUL PACIERA IS A FENCE MAN FOR STOLEN PROPERTY AND THAT MANY OF THE KNOWN BURGLARS OFTEN BRING STOLEN PROPERTY TO PACIERA TO MAKE THEIR MONEY FOR BUYING NARCOTICS." In addition to this, the officers, including the affiant, effected a stake out of the premises at 1042 West Mary Poppins Drive, Harvey, Louisiana and personally observed Edward Johnson, N/M 22 who is a known burglar to the affiant

from New Orleans, Louisiana, going to the residence. Thus, the facts on the affidavit clearly offer something much more substantial than a "casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Appellant contends that the affidavit was defective because the informant spoke to a New Orleans Police Officer who in turn spoke to the affiant. *In U. S. v. Melancon*, 462 F. 2d 82 (5th Cir. 1972) U.S. cert. denied, 409 U.S. 1038, the court held that THERE WAS NO REASON TO DISCREDIT INFORMATION PASSED FROM ONE LAW ENFORCEMENT OFFICIAL TO ANOTHER BEFORE BEING OFFERED TO A MAGISTRATE AS GROUNDS FOR PROBABLE CAUSE. And in *U. S. v. Smith*, 462 F. 2d 456 (8th Cir. 1972), the court held that a magistrate need not categorically reject hearsay upon hearsay in an affidavit for search warrant, but INSTEAD HE SHOULD EVALUATE THIS INFORMATION AS WELL AS *ALL OTHER* INFORMATION IN THE AFFIDAVIT IN ORDER TO DETERMINE WHETHER IT CAN BE REASONABLY INFERRED THAT THE INFORMANT HAD GAINED HIS INFORMATION IN A RELIABLE WAY. (In this latter case the issue was informant to informant to informant whereas in the present case the issue is informant to police officer to fellow police officer — affiant). The *Smith* case has been followed on this point by *United States v. Kleve*, 465 F. 2d 187 (8th Cir. 1972) and *United States v. McCoy*, 478 F. 2d 176 (10th Cir. 1973).

In *U. S. v. Ventresca*, 380 U.S. 102, 108, 132 L. Ed 2d 684, 688, 85 S. Ct. 741 (1965) the court held that "if the teachings of the court cases are to be followed and the

constitutional policy served, affidavits for search warrants ... must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion ... Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." (Emphasis added.)

Moreover, if the courts become increasingly technical and rigid in their demands upon police officers, they may make it increasingly easy for criminals to operate, detected but go unpunished. Thus, a significant movement of the law beyond its present state would be unwarranted, unneeded, and dangerous to law enforcement efficiency.

Therefore, the State contends the affidavit in support of the issuance of the search warrant was valid and all evidence seized thereunder admissible.

CONCLUSION

The law as stated above and the facts as indicated above lead to the conclusion that the petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ABBOTT J. REEVES, ESQ., a member of the Bar of the Supreme Court of the United States, hereby certify that three true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on Petitioner by mailing copies thereof in duly addressed envelopes to Lawrence J. Genin of Chauppette, Genin, Mendoza and Parent, 4899 Westbank Expressway, Marrero, Louisiana 70072, this ____ day of March, 1976.

ABBOTT J. REEVES, ESQ.